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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

T. H. BELL, SECRETARY OF EDUCATION,
Petitioner,

vs.

STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION,
Respondent.

T. H. BELL, SECRETARY OF EDUCATION,
Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF RESPONDENT STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF RESPONDENT STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION

The Respondent, State of New Jersey, Department of Education, respectfully requests that this Court deny the Petition for Writ of *Certiorari* seeking to review the opinion of the United States Court of Appeals for the Third Circuit reported at 662 F.2d 208.

Statement of the Case

This case involves separate federal audits of educational programs implemented in New Jersey and Pennsylvania with moneys appropriated under Title I of the Elementary and Secondary Education Act of 1965.*

The purpose of the Title I program is "to provide financial assistance . . . to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs." 20 U.S.C. § 2701 (1976). Pursuant to its provisions, therefore, substantial amounts of federal aid are directed to local school districts experiencing difficulties in funding adequate programs due to concentrations of low-income families. H. R. Rep. No. 95-1137, 95th Cong. 2d Sess. (May 11, 1978). The basic responsibility for designing and implementing a Title I program is committed to the "local educational agency" which, most typically, is a public board of education. 20 U.S.C. § 244(6)(B). The local agency develops an educational program to meet the unique needs of the educationally deprived children within its attendance area and submits the proposal to the State educational agency for approval. If acceptable, the State agency will approve the Title I proposal and submit it to the United States Department of Education which has the ultimate responsibility for administering the Title I program and dispensing the funds appropriated and allocated thereunder.

Comporting with this administrative structure, the Board of Education of the City of Newark, the local educational agency involved in the New Jersey case, submitted a Title I proposal to the New Jersey Department of Education

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* The facts set forth herein relate solely to the New Jersey Title I program.

for each fiscal year which was included in the present federal audit. These proposals were approved by the State agency and were similarly found acceptable by the appropriate federal officials. The Newark Title I application for the 1971-72 fiscal year, which was the primary focus of the federal audit, showed that 33.9% of the children in the Newark school district were from low-income families (PNJa290).* The statistics further demonstrated that in some areas of the City the incidence of children from low-income families was as high as 80%. The Newark application showed that 53 of the 67 schools in the City had low-income percentages higher than the district-wide average of 33.9% while only 6 schools had less than 20% low-income students (PNJa366 to PNJa367). The narrative portion of the 1971-72 application also demonstrated that Newark was uniformly disadvantaged in other ways. The City was then, as it still is today, in a more advanced state of urban decay than any other in the country. Statistics showed a jobless rate in 1970 of 14%, a rate double that needed to qualify, at that time, under the Economic Development Act. Another 35,000 residents were earning $3,000 per year or less. In 1971, the Model Cities program in Newark was expanded to include the entire city (PNJa298). At the time the 1971-1972 proposal was submitted, Newark had a black population of 54.2% with another 11% of its population of Hispanic background. The City also had the highest percentage of slum housing in the nation, the highest incidence of crime, and the second highest birthrate. Of particular significance to the Title I program, and exacerbating the inherent difficulties of obtaining precise statistics of Newark's low income population, was the fact that

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* PNJa—refers to the Appendix submitted on behalf of the Petitioner, State of New Jersey Department of Education, in the Court of Appeals for the Third Circuit.

in 1970-71, Newark had the highest population turnover in the nation. Indeed, Model Cities data indicate that mobility rates reached as high as 80% for schools in the Title I area.

The Department of Health, Education and Welfare Audit Agency conducted an audit of the Title I program in Newark for the period from September 1, 1970 to August 31, 1973.* During that three-year period, of the $156,166,574 in Title I funds received by the State of New Jersey, $28,709,198 was allotted to the City of Newark (PNJa5). The initial audit report of the Newark Title I program was received by the New Jersey Department of Education on October 21, 1974 while the final report was dated June 20, 1975. This was followed by a Final Audit Determination Letter, dated June 11, 1976, which demanded that New Jersey repay $132,467 expended by allegedly ineligible Newark schools during fiscal year 1970-71 and $1,029,630 expended by allegedly ineligible schools in 1971-72. There was no demand for the repayment of funds expended during the 1972-73 fiscal year since the auditors discerned no problems in the grant expenditures for that year.

On October 21, 1976, the State of New Jersey requested a review of the final audit determination thereby commencing an administrative proceeding which was not to conclude until 1980. During that entire proceeding, the State of New Jersey consistently pressed three arguments: (1) that the federal agency was without jurisdiction to demand repayment of allegedly misspent Title I moneys but was restricted to the express statutory remedy provided—the

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* The Office of Education in the Department of Health, Education and Welfare is the predecessor to the Department of Education created by the Department of Education Organization Act, Pub.L. No. 96-88, 93 Stat. 668 (1979) (codified at 20 U.S.C. §§ 3401-3508 (Supp. III 1979)).

withholding of future entitlements of Title I funds; (2) that recalculations made in accordance with education regulations and guidelines demonstrated that 11 of the schools declared ineligible by the HEW auditors were, in fact, eligible; and (3) that Newark had such a high district-wide percentage of children from low-income families that the entire district qualified for designation as a Title I area. The Education Appeal Board, in a decision dated February 19, 1980, totally rejected these arguments and once again demanded that the State of New Jersey repay $1,031,304 to the United States Office of Education. The only difference between this amount and the sum demanded in 1976 was $130,613, an amount concededly barred by operation of the applicable statute of limitations. 20 U.S.C. § 884 (1976). By letter dated May 7, 1980, New Jersey was advised that the Panel's Decision was the final decision of the United States Department of Education.

The State of New Jersey, Department of Education, filed a Petition for Review of the Secretary of Education's decision with the United States Court of Appeals for the Third Circuit, pursuant to 20 U.S.C. § 2851. In its Petition, New Jersey advanced its substantive arguments as well as pursuing its contention that the United States Department of Education was without statutory authorization to order the State to repay Title I moneys but was limited to withholding future payments. Although the petitions were never formally consolidated, the Third Circuit issued a single opinion granting the Petitions for Review of both New Jersey and Pennsylvania and reversing the Orders of the Department of Education which had required the repayment of previously received Title I funds (Pa25).*

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* Pa—refers to the Appendix submitted on behalf of T. H. Bell in support of the present Petition for Writ of *Certiorari*.

The underpinning of the Third Circuit's decision was the "overarching principle" of *Pennhurst State Sch. & Hospital* v. *Halderman*, 450 U.S. 989 (1981) "that the terms and conditions of a federal grant must be set forth clearly and unambiguously in the statute authorizing the grant" (Pa14). The Court below found that at the time the Title I grants were made to New Jersey and Pennsylvania, Congress had not statutorily authorized the federal agency to order the repayment of misspent or misapplied funds. Indeed, it was not until five years after the last of the disputed funds were received, that the 1978 Amendments to the Elementary and Secondary Education Act specifically authorized the federal agency to order repayment of misspent or misapplied funds. 20 U.S.C. § 2835. The Third Circuit also considered and rejected the federal government's argument that it had a common law right to recover misspent funds which right could be exercised within the context of an administrative proceeding. The Court below held that "if an agency employing an advance-funding scheme such as that provided for in Title I relies on a common law right to recover misspent funds, it may do so only by maintaining a civil action in a court of competent jurisdiction" (Pa25).

A Petition for Rehearing was denied by the Third Circuit in an Order entered December 17, 1981. The Secretary, on May 17, 1982, filed the instant Petition for Writ of *Certiorari*.

ARGUMENT

The decision of the Third Circuit represents a well reasoned application of the *Pennhurst* rationale which is entirely consistent with basic principles of statutory construction and the weight of judicial precedent and any conflict between the Third and Fourth Circuits on the retroactive application of the 1978 statutory amendments, authorizing the Federal government to order states to repay misspent Title I moneys, to pre-1978 grants is a conflict of extraordinarily narrow dimension which does not warrant review by this Court.

The opinion below does not deprive the United States Department of Education of any remedy needed to assure compliance with the complex requirements of the Title I program or to further the overall effectiveness of this "valuable national educational program" (Pa24). Rather, the Third Circuit opinion simply holds that the Department, in discharging its regulatory functions, is limited to those remedies specifically authorized by statute. Prior to the 1978 Amendments, the Department could withhold future Title I funds or disapprove applications if States were found out-of-compliance with Title I requirements. In 1978, Congress expanded those remedies specifically authorizing the Department to order States to repay misspent or misapplied funds. Since the New Jersey and Pennsylvania cases involved grant moneys received in 1970 through 1973, a full five years before "repayment" was added to the Department's available remedies, the Department was limited in resolving those cases to withholding future grant moneys or disapproving grant applications within the context of an administrative proceeding. Furthermore, the Court below did not deny the existence of a common law right of recoupment. Rather, it correctly held that if the Department seeks to recover pre-1978 Title I

funds, and not simply withhold future Title I moneys, it would have to exercise that common law right by maintaining a civil action in a Court of competent jurisdiction. Since the opinion below is consistent with this Court's decision in *Pennhurst State School & Hospital* v. *Halderman, supra,* and is consistent with applicable rules of statutory construction and the weight of judicial precedent and is of such limited applicability, this Court should decline to grant the writ of *certiorari.*

In *Pennhurst State School & Hospital* v. *Halderman, supra,* this Court concluded that:

> ". . . legislation enacted pursuant to the Spending Power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the Spending Power thus rests on whether the State voluntarily and knowingly accepts the terms of the contract. [citations omitted] There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. [citations omitted] By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation." 101 S.Ct. at 1539-40.

Applying this fundamental principle, it was determined in *Pennhurst* that the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6001-6080, did not contain such clear and unambiguous expression of intent as would impose affirmative obligations on the states

to provide mentally retarded persons with appropriate treatment in the environment that would be least restrictive of their personal liberty.

The Third Circuit, in its decision below, faithfully applied the *Pennhurst* rationale finding that a state could only exercise its prerogative to participate in a federal grant program "knowledgeably" and "in the public interest," if it were able to fully assess the program's possible risks and benefits. Since the only sanctions available to the federal government when the controverted Title I funds were received by New Jersey and Pennsylvania were the withholding of future Title I funds and the disapproval of Title I applications, the Court concluded that the States were prevented from making an "informed" assessment of the risks of participation in a program which also included the remedy of repayment. The Court below, therefore, refused to apply retroactively newly adopted statutory amendments providing for repayment of misspent or misapplied funds—a sanction created by statute five years after the last of the disputed funds at issue here were received by New Jersey.

The Third Circuit holding was eminently correct. The fact that New Jersey and Pennsylvania chose to participate in the Title I program after the sanction of repayment was included among the remedies available to the federal government does not undermine its logic. The decision to participate in the Title I program after Congress, in clear and ambiguous terms, had authorized the federal government to order States to repay misspent or misapplied funds, permitted the States to make the "informed" choice required by *Pennhurst*. Furthermore, the "risk" of the repayment sanction in 1978 when it was specifically authorized by Congress is significantly different from the risks this sanction would have engendered during the early years of the Title I program. This Court

may take judicial notice of the fact that there is a greater potential for confusion and consequent good faith errors in the start-up phase of a program than where a program has an established track record. The New Jersey case exemplifies precisely that risk. Because of the unavailability of complete statistical data as to the number of children eligible to attend schools in each specific attendance area, the Newark school district was forced to use an alternate method to calculate Title I eligibility. This lack of complete statistical information, together with the confused state of Title I rules and regulations during the early years of the program, provided the factual basis for the Newark audit dispute. Under such circumstances, the risk occasioned by the "repayment" sanction, had it been available during the early years of Title I, would have been considerable. Indeed, it can be argued that Congress withheld the repayment sanction until such time as the federal government upgraded its implementation of the Title I program and State and local governments had readily available adequate statistical data with which to accurately calculate Title I eligibility to compensate for these disparate risks.

The Seventh Circuit in *Lieberman* v. *University of Chicago,* 660 F.2d 1185 (7th Cir. 1981) *cert. denied* 50 U.S. L.W. 3839 (Apr. 19, 1982) engaged in a similar application of the *Pennhurst* rationale. In that case, the Court held that the Education Amendments of 1974 do not impliedly provide a damages remedy to an individual allegedly discriminated against on the basis of her sex. In reaching this conclusion, the Court found that both Title IX and its legislative history were silent as to the existence of a damages remedy for sexual discrimination.

> "However, the implication of a damages remedy would impose a potentially massive financial lia-

> bility upon the institutions whose 'acute financial distress' triggered the legislation. . . . this potential liability would be a significant factor which the recipients would need to consider before it could be said that they had exercised their choice 'knowingly, cognizant of the consequences of their participation', *Pennhurst,* 101 S.Ct. at 1540." *Lieberman, supra,* 660 F.2d at 1188.

It was, therefore, concluded that "as a matter of statutory construction" no implied damages remedy exists since "if Congress had intended to create a remedy for damages, it would have done so explicitly." *Id. See also*: *State of Cal.* v. *Block,* 663 F.2d 855 (9th Cir. 1981) (The Court refused to apply amendments to the 1964 Food Stamp Act which gave clearer authority to the Department of Agriculture to collect money from erring States since the acts of the State of California, at issue, occurred before the effective date of those amendments.)

The decision in *Pennhurst* and that of the Third Circuit below is clearly consistent with:

> "[T]he first rule of construction . . . that legislation must be considered as addressed to the future, not the past . . . [and] a retrospective operation will not be given to a statute which interferes with *antecedent rights* . . . unless such be 'the unequivocal and inflexible import of the terms, and the manifest intention of the legislature.' *Greene* v. *United States,* 376 U.S. 149, 160 (1964) (quoting *Union Pacific Railroad* v. *Laramie Stock Yards Co.,* 231 U.S. 190, 199 (1913)). See *United States* v. *Richardson,* 512 F.2d 105, 106 (3d Cir. 1975)." (Pa12) (Emphasis added).

It is recognized, of course, that a Court will generally apply the law in effect at the time it renders its decision unless doing so would result in "manifest injustice" or there is statutory direction or legislative history to the contrary. *Bradley* v. *Richmond School Board*, 416 U.S. 696 (1974). The concerns relative to the possible working of an injustice center upon (a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights. *Bradley, supra*, 416 U.S. at 717. It is clear from *Pennhurst*, that this Court would view a subsequent change in law which varied the terms of the "contract" in a federal grant program as resulting in such "manifest injustice" as to preclude its retroactive application. The appropriateness of this characterization is readily apparent when the nature of the parties in the present matter is considered. The real parties in interest here are not simply the State and Federal Governments —but the children in the Newark school system. The retroactive application of the repayment sanction could well deprive those educationally deprived children presently enrolled in the Newark system of moneys otherwise available to them for current educational services. Such application, to punish possible administrative errors which occurred during the 1971-1972 fiscal year and which have long since been prospectively remedied, is manifestly unjust and surely would not be countenanced by this Court any more than it was permitted by the Third Circuit in its decision below.

The Secretary also argues, at some length, that the Court below incorrectly deprived the Department of its common law right to order states to repay allegedly misapplied Title I grant moneys. This contention is singularly lacking in merit. Preliminarily, since the 1978

Amendments specifically authorize the Department to order states to repay misspent or misapplied Title I grant moneys, the Department's common law argument relates solely to currently pending pre-1978 Title I appeals. Most significantly, the Department seeks to support its common law argument with cases which simply stand for the proposition that recoupment is available as a "self help" measure where the federal government holds money due a recipient. *See United States* v. *Carr,* 132 U.S. 644 (1890) (Postmaster General withheld portion of salary due Carr who had not performed mail deliveries as directed); *Wisconsin Central R. Co.* v. *United States,* 164 U.S. 190 (1896) (post office withheld payments due land grant company to recoup higher rate erroneously paid by post office to that company); *Grand Trunk Western Ry. Co.* v. *United States,* 252 U.S. 112 (1920) (Postmaster General deducted the amount of overpayents to a land grant company from moneys otherwise payable to that company); *Collins* v. *Donovan,* 661 F.2d 705 (8th Cir. 1981) (government deducted erroneous overpayment from benefits due recipient); *Jacquet* v. *Westerfield,* 569 F.2d 1339 (5th Cir. 1978) (current assistance grants under Aid to Families with Dependent Children program reduced to recoup prior overpayments of benefits). Even the decision in *Mount Sinai Hospital* v. *Weinberger,* 517 F.2d 3229 (5th Cir. 1975) *cert.* denied 425 U.S. 935 (1976) simply involved "recoupment" achieved by an offset of funds not yet disbursed by the federal government. Since the Department has always had available to it the statutory remedy of "withholding" Title I moneys, it simply has never had to exercise the comparable common law "self help" remedy described in these cases. Indeed, the only case cited by the Secretary wherein the government sought to "recover" money already in the hands of the recipient is *United States* v. *Wurts,* 303 U.S. 414 (1938). Most importantly, a judicial

suit rather than an administrative remedy was initiated in *Wurts* to recover those moneys. It was precisely this conclusion which the Third Circuit correctly reached below—if the federal government determined to recover pre-1978 Title I grant moneys from the States, it would have to do so in a court of competent jurisdiction and not within an administrative proceeding. This conclusion, supported by the cases advanced by Petitioner, does not warrant review by this Court.

The Secretary contends, however, that this Court should grant *certiorari* since the decision below conflicts with that of the Fourth Circuit in *State of W. Va.* v. *Secretary of Ed.*, 667 F.2d 417 (4th Cir. 1981). In the latter decision, it was held that the Secretary of Education could order West Virginia to repay $125,000 which had been misspent for the construction of an administrative office complex. The Secretary argues that:

> "Unless the circuit conflict is resolved, and the decision below reversed, the Secretary must either undertake the expensive, time-consuming, and duplicative effort of pursuing these claims in a number of district courts despite the favorable ruling of the Fourth Circuit, or he must face further delays in his attempts to recoup the funds on the basis of the Board hearings, while other states, relying on the decision below, challenge his authority in courts of appeals that have not spoken on the issue. Only a prompt decision by this Court can avoid the inevitable expense, delay, and administrative confusion created by this conflict." (Pb11 to Pb12).

Pursuant to Rule 17(1)(a), a conflict between or among circuits is an element which will be considered by this Court when determining whether to exercise its discretion and grant a petition for writ of *certiorari*. However, the

mere existence of a conflict is clearly not determinative. The present case does not disclose an irreconcilable conflict among or between the circuits or even a situation where one circuit reviews and specifically rejects the decision of another circuit. For all practical purposes, the Third and Fourth Circuits issued their respective opinions simultaneously and any conflict between these decisions is spontaneous rather than studied and intentional. Furthermore, the conflict, such as it is, concerns the retroactive application of a statutory remedy, authorized in 1978, to audit appeals involving Title I ESEA grant moneys received by States prior to that year. It is, therefore, a conflict of uniquely limited dimensions which will be totally extinguished when the pre-1978 audit appeals are concluded.* Nor can the Secretary breathe new life into this conflict by contending that the decision below will broadly impact on the totality of federal grant programs. Although a court may seek guidance from the Third Circuit's disposition of pre-1978 Title I ESEA grant appeals, it is undisputed that litigation involving a particular federal grant program must be resolved within the precise and often complex statutory and regulatory structure governing that program.

This Court should, therefore, decline to grant the petition for writ of *certiorari* since the Third Circuit decision represents a well reasoned application of the *Pennhurst* rationale which is entirely consistent with basic principles of statutory construction and the weight of judicial prece-

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* The Secretary has informed this Court that 27 audit appeals involving Title I moneys received by States prior to 1978 are presently pending before the Education Appeal Board. To the extent that these appeals involve substantive challenges to the various audit determinations, however, the grant or denial of the instant Petition will simply not dispose of them.

dent and since any conflict between the Third and Fourth Circuits on the retroactive application of the 1978 statutory amendments, authorizing the federal government to order States to repay misspent moneys, to pre-1978 Title I audit appeals is a conflict of extraordinarily narrow dimensions which need not be reviewed and resolved by this Court.

CONCLUSION

For these reasons, the Petition for Writ of *Certiorari* should be denied.

Respectfully submitted,

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